

ADDENDUM TO  
RECORD OF PROCEEDINGS  
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 96-00356

AUG 26 1998

COUNSEL: None

HEARING DESIRED: No

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RESUME OF CASE

On 21 March 1995, the Board considered and recommended granting applicant's 9 July 1994 application requesting the following:

1. The Officer Performance Report (OPR) rendered for the period 25 July 1991 through 24 July 1992 be removed from his records and replaced with a reaccomplished report rendered for the period 25 July 1991 through 3 February 1992.

2. The OPR for the period 4 February 1992 through 30 December 1992 be placed in his record.

3. The "From" date in Section 1, Item 5, on the OPR rendered for the period 25 July 1992 through 17 September 1993, be amended to reflect 31 December 1992.

4. He be considered for retention by Special Selection Board (SSB) for the Fiscal Year 1993 (FY93) Reduction-in-Force Board.

A complete copy of the Record of Proceedings is attached at Exhibit G.

Applicant was selected for retention on active duty by an SSB on 14 August 1995, and advised to request reinstatement on active duty if he so desired. (Exhibit H)

On 6 February 1996, applicant submitted another application requesting:

1. Reinstatement to active duty with credit for continuous service from date of separation to time of reinstatement.

2. Promotion to the grade of captain, active duty, with date of rank adjusted to 10 August 1993.

3. All official records and files be made whole, without prejudice, to future military promotions and special selection boards. Update all official records and military personnel computer to reflect positions held up to and including present Air Force Reserve position. Update and correct all official records, including Officer Performance Reports (OPRs) and awards/decorations, to reflect the corrected date of promotion to captain.

4. Full backpay and allowances, from 1 January 1993 to present, to include but not limited to base pay, BAQ, BAS, the cost of medical benefits, commissary/BX privileges, MWR privileges, tax benefits, retirement benefits and reimbursement for all legal fees associated with, and up to the time of reinstatement.

5. Credit for active duty annual leave accrued from 1 January 1993 through reinstatement.

6. Assignment to a military position equivalent to the position held as of the date of this application. He requests that upon reinstatement he be reassigned to the 437th Airlift Wing at Charleston AFB, SC.

7. Assignment to base of choice prior to reinstatement. He requests that his situation be made whole in that he be reinstated to his base of separation (Charleston AFB, SC) without the financial and time commitment normally associated with a Permanent Change of Station (PCS) move.

8. Reinstatement to be at no cost or commitment to service member.

On 7 August 1996, the Board recommended granting applicant's request for reinstatement to active duty and promotion to the grade of captain by the Calendar Year 1992B (CY92B) Central Captain Selection Board and awarded an appropriate date of rank and effective date of promotion. In addition, the Board recommended that an AF Form 77, Supplemental Evaluation Sheet, be prepared "and inserted in the record in its proper sequence indicating that no performance report is available for the period when member was not serving on active duty and containing the statement, "Report for this period not available for administrative reasons which were not the fault of the member." The Board denied applicant's remaining requests.

A complete copy of the Record of Proceedings is attached at Exhibit I.

On 30 October 1996, applicant submitted additional documentation and requested the Air Force Board for Correction of Military Records (AFBCMR) rescind its decision to remove his Reserve OPRs from his official active duty record and replace them with an AF Form 77, his Reserve OPRs and decorations be updated and returned to his official record, and direct promotion to major. His case was reopened. (Exhibit J)

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AIR FORCE EVALUATION:

The Staff Judge Advocate, AFPC/JA, reviewed the application and states the applicant is operating under a basic misunderstanding of what documentation is maintained in his active duty record. None of the documents which the applicant describes (his Reserve OPRs and decorations) are now in his official active duty record. When the AFBCMR directed an AF Form 77, Supplemental Evaluation Sheet, be prepared and inserted in his official active duty record in its proper sequence indicating no performance report was available for the period when the member was not serving on active duty, it did not mean that applicant's Reserve OPRs would be removed from his record, because they have never been a part of his official active duty record. In crafting the legal fictions which are inevitable by virtue of the correction process, some explanation is needed to explain the gap in the applicant's service. The method routinely used to "fill the gap" is the one chosen in this case, namely, placing an AF Form 77 in the applicant's official record. This record creates a legal fiction that the applicant was on active duty continuously from the time of his separation until the present. Having corrected applicant's record to show a retroactive promotion and continuous active duty service, it is inconsistent for his record to show that he was in the Reserves and on active duty at the same time. The actions taken by the AFBCMR are legal, proper, and consistent with long standing procedures in these types of cases. The applicant is unhappy with the prospect of having an AF Form 77 in his record covering a four year period. His solution is to ask the AFBCMR to fill the gap in his official active duty record with his Reserve OPRs. They believe his situation may more accurately be a reflection of the current manning needs of the Air Force and the timing of his reinstatement to active duty than it is an absence of his Reserve OPRs in his record. Assignment forecasting, is by its very nature, a long term process. When a person is thrown into the middle of this process, as the applicant is, it may be that he cannot be "plugged in" as well as he might have been if he had been a part of the original forecast. In reality, the applicant can (and did in this case) make assignments personnel aware of his Reserve experience even without the Reserve OPRs being in his record. The needs of the

Air Force are driving the applicant's assignment in this case, not the absence of his Reserve OPRs in his official active duty record. Further, by arguing that his retroactive promotion to captain has effectively created an injustice, applicant seems to have momentarily forgotten that his records were corrected to provide his promotion at his request. Certainly implicit in that request was the realization that success would place the applicant in the position it did. At that time, the applicant seemed more than willing to accept from the correction process the benefits of the retroactive correction (i.e., the status, date of rank and back pay as a captain); yet he now suggests that the correction has caused an injustice as a by-product. In their view, one cannot have it both ways. Finally, they observe that the correction process can only go so far to make an individual whole. The applicant seems to be demanding perfection; that is simply not possible. The corrections to his record he received (which the AFBCMR has provided him a promotion to the rank of captain and all the benefits and pay that go along with it) have necessarily created the situation of which he now complains. Indeed, retroactive dating to establish new dates of rank and pay dates to rectify errors or injustices is an integral part of the correction process. If the downside of that process means the officer may not be immediately eligible for some assignments, that goes with the territory. Although the correction process seems to operate in a world of virtual reality (where fiction becomes facts), when it becomes necessary to effect corrections involving the establishment of retroactive dates of rank, once made, those corrections must be accepted as final and conclusive evidence for all purposes. Just as importantly, the process must end at some point. Not every potential contingency can be remedied, for indeed, these cases could drag on forever addressing new anomalies created by tampering with history. For these reasons, they believe applicant's request to set aside the natural and foreseeable consequence of the earlier correction is not necessary to correct an injustice, and they recommend that the application be denied.

A complete copy of the Air Force evaluation is attached at Exhibit K.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the Air Force evaluation and states that he had not intended to return to active duty as he had hoped to pursue his career through the Reserves. He was miscounseled on this aspect of his request and his options upon reinstatement. He was told he had to accept two whole years on active duty. This was not required, but he accepted it, moved his family and himself at considerable personal expense, and immediately asked

for a waiver of this commitment. He should not have had this commitment at all. The AFBCMR directive ordered that he was on active duty at his home of record pending further orders. AFI 36-2110, Assignments, Paragraph 4-6 states he should have had the option to separate as soon as he received assignment notification. Had this occurred, he would have separated, reactivated (actually retained) his active Reserve status and would have been eligible for the upcoming board. Only because AFPC has chosen to drag out this process, misrepresent his rights and entitlements throughout, has he found himself in this position. He, therefore, asks that the AFBCMR order his file corrected to reflect selection for the Reserve grade of major at the next ResAF promotion board. 10 USC 14004 merely states he must be on the Reserve active-status list to be eligible for promotion - SAF policy requires a year time on this list. As the Board will not be able to consider his file as he will not meet the SAF imposed eligibility criterion (he will meet the statutory eligibility criterion), he asks the Board to correct his record to reflect selection for major at this board.

Applicant's complete response is attached at Exhibit L.

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AIR FORCE EVALUATION:

The Chief, Appeals and SSB Branch, AFPC/DPPPA, reviewed the application and states the applicant believes he will not be competitive at future promotion boards with an AF Form 77 in place instead of his non-extended active duty (NONEAD) performance reports and decorations. They contend that the applicant will be afforded the opportunity to communicate with the board president of the promotion board he is being considered for. At that time, there is no reason the applicant could not attach copies of these OPRs and decorations to his letter to the board president. They do not believe the AFBCMR should further entertain appeals of this nature from the applicant. The applicant's record has been corrected as directed and is valid as it stands.

A complete copy of the Air Force evaluation is attached at Exhibit M.

The Staff Judge Advocate, AFPC/JA, reviewed the application and states the applicant maintains that the AFBCMR erroneously followed the faulty advice of AFPC/JA when it initially sent his case to a SSB. The applicant claims that decision prompted the filing of his remaining claims and resulted in further injustices. He begins with a contention that a SSB would first require his reinstatement to active duty, citing *Doyle v. United*

States, 599 F.2d 984 (1979) and Porter v. United States, No. 91-1008C, Slip Op. (Fed. Cl. Dec 30, 1994). First, Doyle is inapplicable, as it predates the Defense Officer Personnel Management Act (DOPMA) and the statutorily prescribed remedy provided by DOPMA - the SSB. Second Porter is a nonpublished decision of the United States Court of Federal Claims which, according to the rules of the court, has no precedential value or impact beyond the specific facts of that case. Moreover, Porter is under appeal by the Department of Justice (DOJ) as having been decided improperly. In the opinion of DOJ, an opinion they share, an officer like the applicant, who has been separated or retired, can be afforded SSB consideration without placing the officer back on the active duty list. Such authority is clearly provided the Secretary of the Air Force (SAF) under Section 628 of Title 10, United States Code (10 U.S.C. 628). This conclusion is firmly supported by the legislative history of the section, H.R. Rep. No. 1462, 96<sup>th</sup> Cong. 2d Session (1980), at p. 74. In the context of the statutory scheme, the term "officer" applies to the status of the individual at the time of the original promotion consideration when the error or injustice occurred. In other words, the status of the individual at the time of the SSB does not govern, but rather, the status at the time of the error which led to the improper consideration at the original promotion board - when, of necessity, the individual would have been on active duty. The purpose of Section 628 is to provide a mechanism to compare the officer's record with a sampling of other active duty list officers' records in a process which, by its very design, is intended to recreate history (a new promotion consideration to replace the original faulty one). When that premise is combined with the realization that the very same subchapter of Chapter 36 that contains Section 628 also provides that officers twice passed over must be separated within six months (Section 631), it would make no sense at all in the context of such a scheme to exclude from consideration under Section 628 the very officers who are most likely going to need to utilize that SSB procedure to resolve the alleged errors that ultimately led to their separation. Consequently, the only reasonable conclusion to be drawn is that the authority of Section 628 extends to separated officers, and there is no requirement to reinstate such officers to active duty in order to use this procedure.

Moreover, the SAF clearly has the independent statutory authority pursuant to 10 U.S.C. 8013 to convene an SSB to consider an officer who is not currently on the active duty list. Such authority was exercised when SAF promulgated AFR 36-89, which, at paragraph 5-3, provided that "special selection boards may also be used for separated officers (who have not been restored to active duty) who have petitioned the AFBCMR or a court to be restored to active duty." This promulgation is consistent with the governing DOD Directive, DODD 1320.11, which encourages the

use of SSBs and acknowledges the authority of the military departments to convene SSBs under an authority other than 10 U.S.C. 628(b). More importantly, that directive does not prohibit the use of SSBs to consider separated officers who were on the active duty list at the time they were originally considered for promotion.

The applicant, it seems, having been granted the relief he requested, was returned to active duty and promoted to captain (presumably with some back pay to go along with that promotion). When that happened, he received an active duty service commitment. He then asked the SAF to waive that commitment and, when that request was approved, he sought to leave active duty and return to the Reserve component. He now faces the prospect of meeting the upcoming reserve promotion board to major with a personnel record containing some active duty OPRs and an AF Form 77. It should be remembered that this situation was one of his own creation. At every step, the applicant was given fair and equitable treatment. He created his own situation and he should be held accountable for the choices he has made along the way. He cannot have it both ways. Furthermore, the applicant, if he so chooses, has an option of submitting a letter to the promotion board, explaining his situation and attaching his Reserve OPRs to that letter. Thus, there is no injustice in this case.

As to the applicant's final and premature request for direct promotion to major, both Congress and DOD have made clear their intent that errors ultimately affecting promotion should be resolved through the use of SSBs. Moreover, they have repeatedly agreed with AF/JAG that the AFBCMR is not in the appropriate position to grant a direct promotion - that in promotion matters, the Board's statutory authority should be limited to correcting military records which may have affected the promotion process, and recommending SSB consideration in appropriate cases. The United States Court of Federal Claims concurs in this, *Finkelstein v. United States*, 29 Fed.Cl, 611 (1993). Otherwise, the AFBCMR - which is not compromised in accordance with 10 U.S.C. 612 and has no basis for comparing an applicant's record with those of his competitors - would be essentially usurping the statutory power of promotion boards. At a minimum, it is safe to say that the AFBCMR has not in the past (and likely will not in the future) consider direct promotion except in the most extraordinary circumstances where SSB consideration was deemed totally unworkable. The applicant's case clearly does not fall into that category. They are of the opinion that the most recent application for relief should be denied.

A complete copy of the Air Force evaluation is attached at Exhibit N.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the Air Force evaluations and states that he is asking for full and fitting relief. He asks for promotion - this time to the Reserve grade of major - because the delay in processing his petition has effectively made him ineligible for the upcoming ResAF Major Selection Board. AFPC has indicated its selection boards are "compromised" - but the AFBCMR is not. He had not intended to return to active duty as he had hoped to pursue his career through the Reserves. He was miscounseled on this aspect of his request, and also on his options upon reinstatement. He was told he had to accept two years on active duty. This was not required, but he accepted it, moved his family and himself at considerable personal expense, and immediately asked for a waiver of this commitment. He should not have had this commitment at all. The AFBCMR directive ordered that he was on active duty at his home of record "pending further orders." AFI 36-2110, Assignments, Para 4-6, states he should have had the option to separate as soon as he received assignment notification. AFI 36-2110, Table 17, line 2, confirms he was eligible for the seven day option (he was denied this option by MPC personnel). Had this occurred, he would have separated, reactivated (actually retained) his active Reserve status and would have been eligible for the upcoming board. Only because AFPC has chosen to drag out this process, misrepresent his rights and entitlements throughout, has he found himself in this position. The AFBCMR, however, can order correction of records as long as the correction is consistent with law. He, therefore, asks his file be corrected to reflect selection for the Reserve grade of major at the next ResAF promotion board (March 1998). 10 USC Section 14004 merely states he must be on the Reserve active-status list to be eligible for promotion - SAF policy requires a year time on this list. As the promotion board will not be able to consider his file since he will not meet the SAF imposed eligibility criterion (he will meet the statutory eligibility criterion), he asks the Board to correct his record to reflect selection for major at this board.

Applicant's complete response is attached at Exhibit O.

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ADDITIONAL AIR FORCE EVALUATION:

The Chief, Appeals and SSB Branch, AFPC/DPPPA, reviewed the application and states that the applicant's contention he is prohibited from affixing attachments to a letter to the promotion board president is unfounded. The current directive, AFI 36-2504, Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force, 1 March 1997, paragraph 4.7.6 addresses the board letter issue. Specifically, it states, "Do

not attach anything that may become or is already a part of the officer's record (such as any PRF, OPRs, or decoration narratives)." Since his records were amended to reflect a continuous period of active duty, and he was reinstated as if he never had a break in service, the documents were appropriately removed by HQ AFPC/DPPPA and are no longer a part of his official records, nor can they ever become a part of his records. Therefore, he may include the OPRs and decorations, along with a letter explaining the "gap" in his OSR for consideration to the promotion board president. Also, this directive applies only to letters to Reserve boards.

AFPC/DPPPA also states that the applicant's apparent dissatisfaction with the relief granted by the Board is quite evident throughout his entire rebuttal. He asserts at one point, there is no basis for removing the OPRs from his records as he had documented service during those four years. They disagree. The OPRs were rendered to a Reserve officer. The applicant asked to return to active duty, with no break in service. He was permitted to do so by the Board's directive. Therefore, as far as the Air Force is concerned, the applicant was on active duty and never had a break in service. In the eyes of the Air Force, the applicant was never a Reserve officer. To allow inclusion of the reports in his OSR would be contrary to the history the applicant recreated through his numerous requests for relief. The applicant can't have it both ways. Either he was a Reserve officer, or he was not. They contend the applicant's record was appropriately amended in accordance with his request and the applicable regulations and will, therefore, always reflect a four year gap. As they have said over and over again, the appropriate method to explain this void in his records is for the applicant to include copies of the extracted documents with a letter to the president of the promotion board. The applicant has not convinced them they erred when they rendered their original advisory opinion. Contrary to his opinion of them, they are not in the business of "getting even". Their job has been, and will continue to be, to provide accurate guidance to the Board, based on the regulatory requirements. Nothing personal. They note the proper procedures were carried out as a result of the Board's directive to grant the applicant relief in these matters. The applicant was returned to active duty as a captain with no break in service and his records were appropriately amended to reflect a continuous period of active duty in accordance with AFI 36-2608, Military Personnel Records System, 1 July 1996, para 2.24.5.

A complete copy of the Air Force evaluation is attached at Exhibit P.

The Staff Judge Advocate, AFPC/JA, reviewed the application and states that with respect to the applicant's reliance upon the legislative history of the Reserve Officer Personnel Management Act (ROPMA), H.R. Rep. No. 84, 103<sup>rd</sup> Cong. 1<sup>st</sup> Sess at 71-72 (1993), they note the following. First, the fact that Congress enacted legislation consistent with the SAF's practice of convening SSBs to reconsider the promotion non-selections of retired and former active duty officers in the context of Air Force Reservists is, in their view, consistent with their interpretation of the Air Force's implementation of 10 U.S.C. 628. They have nothing further to add. This response to the applicant's rebuttal does not change their office's position as stated in their last advisory opinion, and they are still of the opinion that the most recent application for relief should be denied.

A complete copy of the Air Force evaluation is attached at Exhibit Q.

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APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

Applicant review the Air Force evaluations and states that the additional advisories cover only two areas: (1) Should he have been reinstated for his SSB? Now a moot point, but AFPC/JA spends three pages trying to defend its position while ignoring a 1998 case which again proves his position is valid, and (2) Should the Board direct retention of the OPRs and decorations he earned in the Reserves when he reverts to the Reserves? The SSB Issue is Moot. In his last rebuttal he pointed out a major portion of his problem(s) were the result of AFPC's ineptitude. This really no longer matters except as it relates to any credibility this Board might grant the AFPC opinions. One specific issue was whether he had to be on the active duty list (ADL) for SSB consideration. AFPC/JA spends three pages which addresses everything but this issue. He merely invites the Board's attention to the 1998 Court of Federal Claims decision in *Cunningham v. U.S.* As highlighted near the end of this opinion, the Court knows that under current law and directives an officer must be on the ADL for SSB. As for the "ratification of practice" concept, he invites the Board's attention to excerpts of the House and Senate 1999 Defense Appropriations Bills which change 10 USC Para 628 to allow consideration of former and retired officers. If his position was not correct, why would the Congress act to change it? Obviously the law said just what he claimed it said - and the courts and Congress know this well. The Reserve Record Issues. At issue here is retention of the OPRs and decorations/awards he received while a Reservist awaiting return to active duty. From its advisory, it is again

quite obvious AFPC has lost grasp of the obvious. He pointed out in his rebuttal that both the active duty and reserve promotion regulations do not allow attachment of documents which can later become added to the candidate's file. AFPC plays some word games, but the attachment they provided confirms his position! AFI 36-2504, Para 4.7 (Letters to Selection Boards) states: "4.7.6 Do not attach anything that may become or is already a part of the officer's record (such as any PRF, OPRs, or decoration narratives). This is precisely the reason the AFPC "cure" won't work - he can't send these documents to the selection board. But rather than acknowledge the obvious injustice, AFPC merely parrots its pedantic position that because he was reinstated to active duty (due in part to AFPC's own error), he is no longer entitled the performance documentation and awards and decorations he earned in the Reserves. To accept the AFPC position would be patently absurd as it effectively "throws the baby out with the bath water." More importantly, it would guarantee that he continue to suffer the injustice this Board ordered corrected. He, therefore, again asks the Board to merely allow retention of his Reserve OPRs and awards and decorations as he transitions into the Reserves.

Applicant further states he must admit he finds it amazing AFPC has spent so much time first on a moot point (the SSB issue), and secondly on a Reserve promotion record issue (perhaps that is why they cited the wrong regulation initially). He merely asks the Board to rely upon the evidence - not the unsupported illogical ramblings of AFPC. The only conclusion supported by the evidence is retention of the Reserve OPRs and awards and decorations in his file - which he asks this Board to so direct. As AFPC has not objected, he can only assume it is within the Board's scope and authority to also direct his promotion to the Reserve grade of major which he also asks the Board to direct.

Applicant's complete response is attached at Exhibit S.

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THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. In a prior Record of Proceedings, the Board recommended the applicant's corrected record be considered for retention by SSB for the FY93 RIF board and that, if selected for retention by SSB, he be provided the opportunity to return to active duty. Applicant chose to return to active duty. Therefore, we agree with the opinion and recommendation of the Air Force and adopt their rationale as the basis for our conclusion that the

applicant has not been the victim of an error or injustice. Therefore, in the absence of evidence to the contrary, we find no compelling basis to recommend granting the relief sought in this application.

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~~THE BOARD DETERMINES THAT:~~

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

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The following members of the Board considered this application in Executive Session on 2 July 1998, under the provisions of AFI 36-2603:

Mr. LeRoy T. Baseman, Panel Chair  
 Mr. Gregory H. Petkoff, Member  
 Mr. Patrick R. Wheeler, Member  
 Ms. Gloria J. Williams, Examiner (without vote)

The following documentary evidence was considered:

Exhibit G. ROP, dated 26 Apr 95, w/atchs.  
 Exhibit H. Letter, AFPC/DPPAB, dated 12 Oct 95.  
 Exhibit I. ROP, dated 3 Sep 96, w/atchs.  
 Exhibit J. Applicant's Response, dated 30 Oct 96, w/atch.  
 Exhibit K. Letter, AFPC/JA, dated 4 Apr 97.  
 Exhibit L. Applicant's Response, dated 30 Jun 97, w/atchs.  
 Exhibit M. Letter, AFPC/DPPPA, dated 18 Aug 97.  
 Exhibit N. Letter, AFPC/JA, dated 22 Oct 97.  
 Exhibit O. Applicant's Response, dated 30 Dec 97.  
 Exhibit P. Letter, AFPC/DPPPA, dated 10 Feb 98, w/atch.  
 Exhibit Q. Letter, AFPC/JA, dated 23 Feb 98.  
 Exhibit R. Letters, AFBCMR, dated 3 Nov 97, and 16 Mar 98.  
 Exhibit S. Applicant's Response, dated 19 May 98, w/atchs.



LEROY T. BASEMAN  
 Panel Chair